NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,
Plaintiff and Appellant,

V.

RAYMOND LAWRENCE FRAZIER,
Defendant and Respondent.

Docket Number A078053
(Mendocino County Super Ct. No. CR24362)

In October 1996 defendant was charged with lewd and lascivious acts upon a child (Pen. Code, § 288, subd. (a)) committed 12 years earlier, in 1984. At the time the offense was allegedly committed, the limitations period was six years. (Pen. Code, § 800.) In 1994, after the limitations period had expired, the Legislature enacted Penal Code section 803, subdivision (g), (hereafter "section 803(g)"), which extended the limitations period to one year following a report to a law enforcement agency by a person of any age that he or she had been the victim of "substantial" sexual misconduct while under the age of 18.[1] That extension was held to be invalid as an ex

[1] Section 803(g) provided at the time the complaint was filed: "Notwithstanding any other limitation of time described in this section, a criminal complaint may be filed within one year of the date of a report to a law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5. This subdivision shall apply only if both of the following occur: [¶] (1) The limitation period specified in Section 800 or 801 has expired. [¶] (2) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation which is not mutual, and there is

post facto law in *Lynch v. Superior Court* (1995) 33 Cal.App.4th 1223.

Relying on *Lynch*, defendant demurred to the complaint, arguing (1) that as a matter of statutory interpretation section 803(g) did not apply to charges already barred by the statute of limitations and (2) that section 803(g) was unconstitutional as an ex post facto law. The magistrate sustained defendant's demurrer and dismissed the complaint in March 1997.

Effective January 1, 1997, the Legislature amended section 803(g) to declare that the statute is to be applied retroactively. In particular, subpart (3)(B) was added to section 803(g) as follows: "Effective January 1, 1997, through June 30, 1997, this subdivision applies to a cause of action arising before, on, or after January 1, 1994, the effective date of this subdivision, and it shall revive any cause of action barred by Section 800 or 801 if either of the following occurs: [¶] (i) The complaint is filed within the time period specified in this subdivision. [¶] (ii) The victim made the report required by this subdivision to a law enforcement agency between January 1, 1994, and January 1, 1997, and a complaint was not filed within the time period specified in this subdivision or was filed within the time period but was dismissed, but a complaint is filed or refiled on or before June 30, 1997."[2] Citing that

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independent evidence that clearly and convincingly corroborates the victim's allegation. No evidence may be used to corroborate the victim's allegation which would otherwise be inadmissible during trial. Independent evidence shall not include the opinions of mental health professionals." (Stats. 1994, First Ex. Sess., ch. 46, § 2, No. 9 West's Cal. Legis. Service, p. 4003.)

[2] Section 803(g) was further amended by urgency legislation effective June 30, 1997. (Stats. 1997, ch. 29, § 1. No. 3 West's Cal. Legis. Service, pp. 241-242.)

legislative change, the People then moved to reinstate the complaint. The motion was denied, and the People now appeal.

The parties do not dispute that in its amendment to section 803(g) the Legislature intended to revive the prosecution of charges already barred by the statute of limitations. (See generally *People v. Bunn* (1997) 53 Cal.App.4th 227, 231-232.) The sole question for our review is whether section 803(g) is unconstitutional as an ex post facto law. We conclude that it is.

The federal and the state constitutions each prohibit ex post facto laws. (U.S. Const., art. 1. § 10; Cal. Const., art. 1, § 9.) Both ex post facto clauses are analyzed identically. *(People v. McVickers* (1992) 4 Cal.4th 81, 84, citing *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 295.)

In *Collins v. Youngblood* (1990) 497 U.S. 37, the United States Supreme Court eliminated the distinction that had theretofore been made between a substantive and a procedural change in the law. Instead the court clarified that a statute is prohibited by the ex post facto clause if it falls within one of three categories of legislation--one "[I] which punishes as a crime an act previously committed, which was innocent when done; [2] which makes more burdensome the punishment for a crime, after its commission, or [3] which deprives one charged with crime of any defense available according to law at the time when the act was committed . . . ."(Accord, *People v. McVickers, supra,* 4 Cal.4th at p. 84.)

Our focus is on the third category: Does the revival of the right of prosecution after the limitations period has expired deprive the defendant of a defense available according to the law at the time the act was committed?

The Attorney General concedes that California case law, beginning with *Sobiek v. Superior Court* (1972) 28 Cal.App.3d 846, and continuing unanimously thereafter, holds that once the limitations period has expired and prosecution is

barred, a statutory amendment *extending* the limitations period violates the ex post facto clause. (*Lynch v. Superior Court*, *supra*, 33 Cal:App.4th 1223; *Trigg v. Superior Court* (1975) 49 Cal.App.3d 685; 687.)[3] The Attorney General also concedes that in a recent case involving *revival* of charges already barred pursuant the newly-added subpart (3)(B) of section 803(g), the court held the statute to be an ex post facto law. *(People v. Bunn, supra,* 53 Cal.App.4th 227 [review denied].) The Attorney General argues. however, that those cases were decided incorrectly, and the Attorney General urges this court to reach a different conclusion.

We are persuaded by the analysis given by Division Three of this court in *People v. Bunn, supra,* 53 Cal.App.4th 227. All of the Attorney General's arguments are discussed in that opinion, and we find no need to repeat the discussion here. In accordance with that convincing authority, we conclude that defendant cannot be prosecuted for criminal conduct allegedly committed in 1984.

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[3] The ex post facto clause is not violated, however, if the extension was made before the original limitations period expired. (*People v. Masry* (1986) 179 Cal.App.3d 1149, 1151-1152; *People v. Smith* (1985) 171 Cal.App.3d 997, 1001-1002; *People v. Sample* (1984) 161 Cal.App.3d 1053, 1057; *People v. Swinney* (1975) 46 Cal.App.3d 332, 340 disapproved on another point in *People v. Zamora* (1976) 18 Cal.3d 538, 564, fn. 26.) In the often quoted words of Judge Learned Hand: "Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the stake forgives it." (*Falter v. United States* (2d Cir. 1928) 23 F.2d 420, 425-426.)

The order denying the motion to reinstate the complaint is affirmed.

Dossee, J.

We concur:

Strankman, P.J.

Swager, J.

[File-stamp date: December 22, 1997]